

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

SHANE FORREST PATE,

Appellant.

No. 39037-0-II

UNPUBLISHED OPINION

Hunt, J. — Shane Pate appeals his jury conviction for violating a domestic violence court order. He argues that his trial counsel provided ineffective assistance in failing to move to dismiss for violation of his right to a “speedy trial.” In his Statement of Additional Grounds (SAG), Pate contends that the trial court erred in imposing a sentence that exceeds the statutory maximum. We affirm.<sup>1</sup>

**FACTS**

On October 16, 2008, the State charged Pate with felony violation of a domestic violence court order. The court arraigned him<sup>2</sup> and set trial for December 11. Between December 11, 2008, and January 15, 2009, the trial court entered 11 orders continuing Pate’s trial, over his

---

<sup>1</sup> A commissioner of this court initially considered Pate’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

<sup>2</sup> The record contains no evidence of Pate’s arraignment date, but both parties’ briefs cite October 16 as the date of arraignment.

objection. Pate's trial began on January 21, 2009.

The first order, dated December 11, 2008, continued Pate's trial to December 30, 2008, under CrR 3.3(f)(1), based on (1) the State's desire to file additional charges, (2) ongoing discovery, and (3) both parties' need to interview additional witnesses. Pate's counsel objected, telling the court he was ready to proceed to trial even though he had been unable to interview the complaining witness, despite submitting a written request. The next five orders, dated December 30 and 31, 2008, and January 5, 6, and 7, 2009, cited no courtrooms available for trial. The last five orders, dated January 8, 12, 13, 14, and 15, 2009, noted that the prosecutor was in another trial.

On January 20, 2009, the trial court called the case for trial. This time, Pate asked for a continuance so that he could obtain suitable attire; the trial court granted a recess until 10:30 the next morning. The next day, the trial court heard motions in limine and the parties selected the jury. After a three-day trial, the jury found Pate guilty as charged. Based on Pate's offender score of 8, the trial court calculated a standard sentencing range of 60 months of confinement and sentenced Pate to 60 months in prison, with credit for 167 days served, and 9 to 18 months of community custody. Pate appeals.

## ANALYSIS

### I. "Speedy Trial"

Pate first argues that his trial counsel provided ineffective assistance in failing to move to dismiss the case for violation of his right to a speedy trial. This argument fails.

#### A. Standard of Review

We give great judicial deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The burden is on the defendant to show deficient representation. *McFarland*, 127 Wn.2d at 335. To prevail on a claim of ineffective assistance, the defendant must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances; and (2) the deficient performance prejudiced him because, had the errors not occurred, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 335 (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). The defendant must satisfy both criteria in order to show that the conviction "resulted from a breakdown in the adversary process that renders the result unreliable." *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (quoting *Strickland*, 466 U.S. at 687).

#### B. CrR 3.3 Time for Trial

CrR 3.3 provides that a defendant who is detained in jail must be brought to trial within 60 days of his arraignment, with allowances for specified exclusions. CrR 3.3(b)(1)(i), (c)(1). The rule protects a defendant's constitutional right to a speedy trial<sup>3</sup> and prevents undue and oppressive incarceration before trial. *State v. Kingen*, 39 Wn. App. 124, 127, 692 P.2d 215 (1984), *review denied*, 103 Wn.2d 1031 (1985). But a defendant's constitutional right to a speedy trial does not mandate trial within 60 days of incarceration or arraignment. *State v.*

---

<sup>3</sup> A defendant has a right to a speedy trial under the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington State Constitution. See *State v. Carson*, 128 Wn.2d 805, 820 & nn. 63-64, 912 P.2d 1016 (1996).

*Torres*, 111 Wn. App. 323, 330, 44 P.3d 903 (2002), *review denied*, 148 Wn.2d 1005 (2003).

CrR 3.3(f)(1) and (2) permit the trial court to continue the trial past the initial 60 days on written agreement of the parties or when required for the “administration of justice.” Here, the trial court initially continued the trial date because both parties needed additional time to interview witnesses and to investigate the case fully, thereby implicitly continuing the trial because it was required for the “administration of justice.” Thus, the December 11 continuance was valid under CrR 3.3(f)(2).

CrR 3.3(e) excludes from the original 60-day time-for-trial period time attributable to valid continuances, after which CrR 3.3(b)(5) extends the time-for-trial period to at least “30 days after the end of that excluded period.” The trial court entered the initial December 11 order, continuing the trial to December 30, before the original CrR 3.3 60-day period expired on December 15. Then CrR 3.3(e) operated to exclude from the 60-day period the continued days between December 11 and December 30, and CrR 3.3(b)(5) operated to extend the time-for-trial to January 29, 2009, 30 days after the December 30 end of the excluded period. *See* CrR 3.3(b)(5). Pate’s trial began January 21, 2009, before this new time-for-trial period expired on January 29. We hold, therefore, that there was no violation of Pate’s right to a “speedy trial” under CrR 3.3.

### C. Waiver of Motion To Dismiss for CrR 3.3 Violation

CrR 3.3(d)(3) provides:

*Objection to Trial Setting.* A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make

such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.<sup>[4]</sup>

Under CrR 3.3(h), the trial court must dismiss charges only when the applicable speedy trial period has expired without a trial.

We have already held that the applicable time-for-trial period had not expired before Pate's trial began. Thus, there was no legal basis for a motion to dismiss under CrR 3.3(h). Because, therefore, a motion to dismiss would have been futile,<sup>5</sup> defense counsel's "failure" to move to dismiss was not deficient performance. We hold that Pate fails to show his trial counsel's assistance was ineffective.<sup>6</sup>

## II. Sentence

In his SAG, Pate contends that his sentence, 60 months of confinement, to be followed by

---

<sup>4</sup> A defendant waives his right to dismissal on those grounds if he fails to bring a motion to dismiss before trial. *State v. Thomas*, 1 Wn.2d 298, 300, 95 P.2d 1036 (1939).

<sup>5</sup> Nevertheless, Pate asserts as ineffective assistance his counsel's failure to bring a CrR 3.3(h) motion to dismiss because (1) the trial court repeatedly continued the trial date past the original 60-day limit without making the required findings, contrary to *State v. Kenyon*, 167 Wn.2d 130, 139, 216 P.3d 1024 (2009); and (2) the record does not support the trial court's first six continuance orders, dated December 11, 2008, through January 7, 2009. These assertions have no bearing on whether defense counsel would have prevailed on a CrR 3.3(h) motion to dismiss under the facts of this case. The other five continuances, dated December 30, 2008, through January 7, 2009, fell within the December 11 order's extended "speedy trial" period under CrR 3.3. Therefore, as we explain above, these continuances were not grounds for motions to dismiss under CrR 3.3(h).

<sup>6</sup> Because Pate has failed to satisfy the deficient performance prong of the ineffective assistance of counsel test, we need not address the second prejudice prong. Nevertheless, we note that Pate also fails to demonstrate prejudice because the outcome of the trial would have been the same even if trial counsel had moved to dismiss. The trial court did not abuse its discretion when it granted the December 11 continuance based on the State's desire to file additional charges against Pate, the need for ongoing discovery, and both parties' needs to interview additional witnesses. See *State v. Saunders*, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009).

No. 39037-0-II

9 to 18 months of community custody, exceeds the 60-month statutory maximum, citing *State v. Zavala-Reynoso*, 127 Wn. App. 119, 110 P.3d 827 (2005). Pate is incorrect. Where the offender's judgment and sentence provides that the total term of confinement and the actual amount of community custody served cannot exceed the statutory maximum, the sentence is valid. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 670-73, 211 P.3d 1023 (2009). Pate's judgment and sentence contains that provision. Therefore, Pate's sentence is valid.

We affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record. RCW 2.06.040.

---

Hunt, J.

We concur:

---

Armstrong, J.

---

Penoyar, A.C.J.